IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 3.7.2007

CORAM

THE HON'BLE MR.JUSTICE P.D.DINAKARAN
AND
THE HON'BLE MR.JUSTICE P.P.S.JANARTHANA RAJA

T.C.(A) No.903 of 2007

M/s. Tamilnadu Magnesite Ltd.
5/53, Omalur Main Road
Jagir Ammapalayam, Salem. .. Appellant

Vs.

The Deputy Commissioner of Income Tax
Special Range, Salem. .. Respondent

Appeal under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Madras 'D' Bench dated 3.7.2006 in ITA No.1854/Mds/95, for the assessment year 1994-1995 against the order of the Commissioner of Income Tax (Appeals) Coimbatore, made in IT Appeal No.870-C/94-95 dated 02.08.1995 against the order of the Deputy Commissioner of Income-Tax, Special Range, Salem in PAN.47-053-CX 006a dated 12.01.95

For Appellant : Mr.J.Balachander
For Mr.S.Sridhar

J U D G M E N T

(Delivered by P.D.DINAKARAN, J.)

The assessee is the appellant and the appeal is directed against the order of the Income Tax Appellate Tribunal, Chennai dated 3.7.2006 made in ITA No.1854/Mds/95, raising the substantial questions of law, viz.

(a) Whether the Tribunal is correct in confirming the validity of prima facie adjustment made under section 143(1)(a) of the Act in respect of bonus provision of Rs.33,35,984/-?

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(b) Whether the Tribunal is correct in not considering the scope of the powers of the respondent in making prima facie adjustment in the computation of taxable total income while passing the order under section 143(1)(a) of the Act?

2.1. The relevant assessment year is 1994-95. The appellant filed its return on 24.11.1994 for the year ending on 31.3.1994 showing a loss of Rs.4,52,09,221/- and in the tax audit report file in Form No.3 CD with return of income, bonus of Rs.33,35,994/- was provided for, which had not been paid till 23.9.1994.

2.2. Challenging the said adjustment and levy of additional tax thereon, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals) contending that the bonus payable to the employee was an expenditure incurred and laid down wholly and exclusively for the purpose of and in the course of the business carried on. It was also contended that the balance sheet prepared for the said assessment year was true and correct. The Commissioner, by order dated 2.8.1995, held that the provisions of Section 43B of the Act override the provisions of Section 36(1) of the Act and accordingly, the disallowance was properly made and it was a prima facie adjustment made under Section 143(1) of the Act.

2.3. Aggrieved by the said order dated 2.8.1995, the assessee again preferred an appeal before the Tribunal, which, by order dated 3.7.2006 held that the Assessing Officer had rightly added back the bonus provision of Rs.33,35,984/-, as the assessee had not paid the amount within the due date for filing the returns and accordingly, confirmed the order of the Commissioner that Section 43B of the Act override Section 36(1) of the Act, in view of the non obstante clause found in Section 43B of the Act and accordingly, disallowance of the provisions for bonus was properly made.

2.4. Infuriated by the order of the Tribunal, the assessee has preferred the above appeal raising the substantial questions of law aforementioned.

3. Both the substantial questions of law raised by the assessee revolves on the question of the scope of power of the respondents in making the prima facie adjustment while computing the taxable income by exercising the power conferred under Section 143(1) of the Act, particularly in a case where it attracts Sections 36(1) and 43B of the Act, which read as under.

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Section 36(1):

36. Other deductions.--(1) The deductions provided for in the following clauses shall be allowed in respect of the matters dealt with therein, in computing the income referred to in section 28--

(i) the amount of any premium paid in respect of insurance against risk of damage or destruction of stocks or stores used for the purposes of the business or profession;

(ia) the amount of any premium paid by a federal milk co-operative society to effect or to keep in force an insurance on the life of the cattle owned by a member of a co-operative society, being a primary society engaged in supplying milk raised by its member to such federal milk co-operative society;

(ib) the amount of any premium paid by cheque by the assessee as an employer to effect or to keep in force an insurance on the health of his employees under a scheme framed in this behalf by the General Insurance Corporation of India formed under section 9 of the General Insurance Business (Nationalisation) Act, 1972 (57 of 1972), and approved by the Central Government;

(ii) any sum paid to an employee as bonus or commission for services rendered, where such sum would not have been payable to him as profits or dividend if it had not been paid as bonus or commission:

(iia) a sum equal to one and one-third times the amount of the expenditure incurred on payment of any salary for any period of employment before the 1st day of March, 1984, to an employee who, as at the end of the previous year,--

(a) is totally blind, or

(b) is subject to or suffers from a permanent physical disability (other than blindness) which has the effect of reducing substantially his capacity to engage in a gainful employment or occupation:

Provided that the assessee produces before the Assessing Officer, in respect of the first assessment year for which deduction is claimed in relation to each such employee under this clause,--

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(i) in a case referred to in sub-clause (a), a certificate as to his total blindness from a registered medical practitioner being an oculist ; and

(ii) in a case referred to in sub-clause (b), a certificate as to the permanent physical disability referred to in the said sub-clause from a registered medical practitioner:

Provided further that nothing contained in this clause shall apply in the case of an employee whose income in the previous year chargeable under the head "Salaries" exceeds twenty thousand rupees.

Explanation 1.--In this clause, "salary" includes the pay, allowances, bonus or commission payable monthly or otherwise.

Explanation 2.--For the removal of doubts, it is hereby declared that where a deduction under this clause is allowed for any assessment year in respect of any expenditure, deduction shall not be allowed in respect of such expenditure under any other provision of this Act for the same or any other assessment year ;

(iii) the amount of the interest paid in respect of capital borrowed for the purposes of the business or profession;

Explanation.--Recurring subscriptions paid periodically by shareholders or subscribers in Mutual Benefit Societies which fulfil such conditions as may be prescribed, shall be deemed to be capital borrowed within the meaning of this clause;

(iv) any sum paid by the assessee as an employer by way of contribution towards a recognised provident fund or an approved superannuation fund, subject to such limits as may be prescribed for the purpose of recognising the provident fund or approving the superannuation fund, as the case may be; and subject to such conditions as the Board may think fit to specify in cases where the contributions are not in the nature of annual contributions of fixed amounts or annual contributions fixed on some definite basis by reference to the income chargeable under the head " Salaries " or to the contributions or to the number of members of the fund;

(v) any sum paid by the assessee as an employer by way of contribution towards an approved gratuity fund created by him for the exclusive benefit of his employees under an irrevocable trust;

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(va) any sum received by the assessee from any of his employees to which the provisions of sub-clause (x) of clause (24) of section 2 apply, if such sum is credited by the assessee to the employee's account in the relevant fund or funds on or before the due date.

Explanation.--For the purposes of this clause, "due date" means the date by which the assessee is required as an employer to credit an employee's contribution to the employee's account in the relevant fund under any Act, rule, order or notification issued thereunder or under any standing order, award, contract of service or otherwise.

(vi) in respect of animals which have been used for the purposes of the business or profession otherwise than as stock-in-trade and have died or become permanently useless for such purposes, the difference between the actual cost to the assessee of the animals and the amount, if any, realised in respect of the carcasses of animals;

(vii) subject to the provisions of sub-section (2), the amount of any bad debt or part thereof, which is written off as irrecoverable in the accounts of the assessee for the previous year:

Provided that in the case of an assessee to which clause (viia) applies, the amount of the deduction relating to any such debt or part thereof shall be limited to the amount by which such debt or part thereof exceeds the credit balance in the provision for bad and doubtful debts account made under that clause;

Explanation.- For the purposes of this clause, any bad debt or part thereof written off as ...

(viia) in respect of any provision for bad and doubtful debts made by--

(a) a scheduled bank not being a bank approved by the Central Government for the purposes of clause (viiia) or a bank incorporated by or under the laws of a country outside India or a non-scheduled bank, an amount not exceeding five per cent. of the total income (computed before making any deduction under this clause and Chapter VI-A) and an amount not exceeding two per cent. of the aggregate average advances made by the rural branches of such bank computed in the prescribed manner;

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(b) a bank, being a bank incorporated by or under the laws of a country outside India, an amount not exceeding five per cent. of the total income (computed before making any deduction under this clause and Chapter VIA).

(c) a public financial institution or a State Finanical Corporation or a State Industrial Investment Corporation, an amount not exceeding five per cent. of the total income (computed before making any deduction under this clause and Chapter VI-A).

Explanation.--For the purposes of this clause,--

(i) "non-scheduled bank means a banking company as defined in clause (c) of section 5 of the Banking Regulation Act, 1949 (10 of 1949), which is not a scheduled bank ;

(ia) "rural branch" means a branch of a scheduled bank or a non-scheduled bank situated in a place which has a population of not more than ten thousand according to the last preceding census of which the relevant figures have been published before the first day of the previous year ;

(ii) "scheduled bank" means the State Bank of India constituted under the State Bank of India Act, 1955 (23 of 1955), a subsidiary bank as defined in the State Bank of India (Subsidiary Banks) Act, 1959 (38 of 1959), a corresponding new bank constituted under section 3 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 (5 of 1970), or under section 3 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980 (40 of 1980), or any other bank being a bank included in the Second Schedule to the Reserve Bank of India Act, 1934 (2 of 1934), but does not include a co-operative bank ;

(iii) "public Financial Institution" shall have the meaning assigned to it in section 4A of the Companies Act, 1956 (1 of 1956) ;

(iv) "State Financial Corporation" means a financial corporation established under section 3 or section 3A or an institution notified under section 46 of the State Financial Corporation Act, 1951 (63 of 1951) ;

(v) "State Industrial Investment Corporation" means a Government company within the meaning of section 617 of the Companies Act, 1956 (1 of 1956), engaged in the business of providing long-term finance for industrial projects and approved by the Central Government under clause (viii) of this sub-section ;

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(viii) in respect of any special reserve created by a financial corporation which is engaged in providing long-term finance for industrial or agricultural development in India or by a public company formed and registered in India with the main object of carrying on the business of providing long-term finance for construction or purchase of houses in India for residential purposes, an amount not exceeding forty per cent. of the total income (computed before making any deduction under this clause and Chapter VI-A) carried to such reserve account:

Provided that the corporation or, as the case may be, the company is for the time being approved by the Central Government for the purposes of this clause:

Provided further that where the aggregate of the amounts carried to such reserve account from time to time exceeds twice the amount of the paid-up share capital (excluding the amounts capitalised from reserves) of the corporation, or, as the case may be, the company no allowance under this clause shall be made in respect of such excess ;

Explanation.--In this clause,--

(a) "financial corporation" shall include a public company and a Government company ;

(b) "public company" shall have the meaning assigned to it in section 3 of the Companies Act, 1956 (1 of 1956) ;

(c) "Government company" shall have the meaning assigned to it in section 617 of the Companies Act, 1956 (1 of 1956).

(viiia) in respect of any special reserve created by a scheduled bank (other than a bank incorporated by or under the laws of a country outside India) which is engaged in banking operations outside India, an amount not exceeding forty per cent. of the total income (computed before making any deduction under this clause and Chapter VI-A) carried to such reserve account:

Provided that, having regard to its capital structure, the extent of its banking operations outside India, its need for resources for such operations outside India and other relevant factors, the bank is, for the time being, approved by the Central Government for the purposes of this clause.

Explanation.--For the purposes of this clause "scheduled bank", has the same meaning as in clause (ii) of the Explanation to clause (viia) ;

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(ix) any expenditure bona fide incurred by a company for the purpose of promoting family planning amongst its employees:

Provided that where such expenditure or any part thereof is of a capital nature, one-fifth of such expenditure shall be deducted for the previous year in which it was incurred; and the balance thereof shall be deducted in equal instalments for each of the four immediately succeeding previous years:

Provided further that the provisions of sub-section (2) of section 32 and of sub-section (2) of section 72 shall apply in relation to deductions allowable under this clause as they apply in relation to deductions allowable in respect of depreciation:

Provided further that the provisions of clauses (ii), (iii), (iv) and (v) of sub-section (2) and sub-section (5) of section 35, of sub-section (3) of section 41 and Explanation 1 to clause (1) of section 43 shall, so far as may be, apply in relation to an asset representing expenditure of a capital nature for the purposes of promoting family planning as they apply in relation to an asset representing expenditure of a capital nature on scientific research.

(x) any sum paid by a public financial institution by way of contribution towards any fund specified under clause (23E) of section 10.

Explanation.--For the purposes of this clause, "public financial institutions" shall have the meaning assigned to it in section 4A of the Companies Act, 1956 (1 of 1956).

(2) ...

Section 43B:
Certain deductions to be only on actual payment.--Notwithstanding anything contained in any other provision of this Act, a deduction otherwise allowable under this Act in respect of--

(a) any sum payable by the assessee by way of tax, duty, cess or fee, by whatever name called, under any law for the time being in force, or

(b) any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of employee, or

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(c) any sum referred to in clause (ii) of sub-section (1) of section 36, or

(d) any sum payable by the assessee as interest on any loan or borrowing from any public financial institution or a State financial corporation or a State industrial investment corporation, in accordance with the terms and conditions of the agreement governing such loan or borrowing,

shall be allowed (irrespective of the previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by him) only in computing the income referred to in section 28 of that previous year in which such sum is actually paid by him.

Provided that nothing contained in this section shall apply in relation to any sum referred to in clause (a) or clause (c) or clause (d) which is actually paid by the assessee on or before the due date applicable in his case for furnishing the return of income under sub-section (1) of section 139 in respect of the previous year in which the liability to pay such sum was incurred as aforesaid and the evidence of such payment is furnished by the assessee along with such return:

Provided further that no deduction shall, in respect of any sum referred to in clause (b), be allowed unless such sum has actually been paid in cash or by issue of a cheque or draft or by any other mode on or before the due date as defined in the Explanation below clause (va) of sub-section (1) of section 36, and where such payment has been made otherwise than in cash, the sum has been realised within fifteen days from the due date.

Explanation 1.--For the removal of doubts, it is hereby declared that where a deduction in respect of any sum referred in clause (a) or clause (b) of this section is allowed in computing the income referred to in section 28 of the previous year (being a previous year relevant to the assessment year commencing on the 1st day of April, 1983, or any earlier assessment year) in which the liability to pay such sum was incurred by the assessee, the assessee shall not be entitled to any deduction under this section in respect of such sum in computing the income of the previous year in which the sum is actually paid by him.

Explanation 2.--For the purposes of clause (a), as in force at all material times, "any sum payable" means a sum for which the assessee incurred liability in the previous year even though such sum might not have been payable within that year under the relevant law.

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Explanation 3.--For the removal of doubts it is hereby declared that where a deduction in respect of any sum referred to in clause (c) or clause (d) of this section is allowed in computing the income referred to in section 28 of the previous year (being a previous year relevant to the assessment year commencing on the 1st day of April, 1988, or any earlier assessment year) in which the liability to pay such sum was incurred by the assessee, the assessee shall not be entitled to any deduction under this section in respect of such sum in computing the income of the previous year in which the sum is actually paid by him.

Explanation 4.--For the purposes of this section,

(a) "public financial institutions" shall have the meaning assigned to it in section 4A of the Companies Act, 1956 (1 of 1956).

(b) "State financial corporation" means a financial corporation established under section 3 or section 3A or an institution notified under section 46 of the State Financial Corporations Act, 1951 (63 of 1951);

(c) "State industrial investment corporation" means a Government company within the meaning of section 617 of the Companies Act, 1956 (1 of 1956), engaged in the business of providing long-term finance for industrial projects and approved by the Central Government under clause (viii) of sub-section (1) of section 36.

4. There is no dispute as to the position that Section 43B of the Act overrides Section 36(1) of the Act, in view of the non obstante clause employed in Section 43B of the Act. If that be so, to decide as to the power of the respondent for making a prima facie adjustment in the computation of taxable total income while passing order under Section 143 (1) of the Act, it is apt to refer Section 143(1) of the Act, which reads as under.

143. Assessment.--(1)(a) Where a return has been made under section 139, or in response to a notice under sub-section (1) of section 142,--

(i) if any tax or interest is found due on the basis of such return, after adjustment of any tax deducted at source, any advance tax paid and any amount paid otherwise by way of tax or interest, then, without prejudice to the provisions of sub-section (2), an intimation shall be sent to the assessee specifying the sum so payable, and such intimation shall be deemed to be a notice of demand issued under section 156 and all the provisions of this Act shall apply accordingly; and

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(ii) if any refund is due on the basis of such return, it shall be granted to the assessee:

Provided that in computing the tax or interest payable by, or refundable to, the assessee, the following adjustments shall be made in the income or loss declared in the return, namely:--

(i) any arithmetical errors in the return, accounts or documents accompanying it shall be rectified;

(ii) any loss carried forward, deduction, allowance or relief, which, on the basis of the information available in such return, accounts or documents, is prima facie admissible but which is not claimed in the return, shall be allowed;

(iii) any loss carried forward, deduction, allowance or relief claimed in the return, which, on the basis of the information available in such return, accounts or documents, is prima facie inadmissible, shall be disallowed.

... "

5. Clause (iii) of the first proviso to Section 143(1)(a) of the Act enables the respondent for making adjustment in the income or loss declared in the return such as any loss carried forward, deduction, allowance or relief claimed in the return, which, on the basis of the information available in such return, accounts or documents, is prima facie inadmissible, shall be disallowed. As there is no dispute that the impugned deduction is inadmissible in view of Section 43B of the Act, which overrides Section 36(1) of the Act, by operation of law, viz. Clause (iii) of first proviso to Section 143(1)(a) of the Act referred to above, we are of the considered opinion that the respondent is well within the power to make a prima facie adjustment in the computation of taxable total income while passing under Section 143(1)(a) of the Act. Hence, we do not see any substantial question of law, particularly when all the authorities have rightly interpreted the power under Section 143(1)(a) of the Act in the context of Section 43B of the Act which overrides Section 36(1) of the Act. Accordingly, the appeal stands dismissed.

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Asst.Registrar

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Sub Asst.Registrar

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To

1. The Assistant Registrar,
Income-Tax Appellate Tribunal
Rajaji Bhavan, III Floor,
"D" Bench, Besant Nagar, Chennai - 90.

2. The Commissioner of Income Tax (Appeals)
Coimbatore.

3. The Deputy Commissioner of Income Tax,
Special Range, Salem.

1 cc To Mr.J.Balachander, Advocate, SR.40386.

T.C.(A) No.903 of 2007.

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